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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 54 2 1

MARTIN J. BERNARDS AND LENA BERNARDS, HIS WIFE,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), AND JOSEPH M. LOOMIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' BRIEF IN REPLY TO BRIEF OF RESPONDENTS JOHNSON AND LOOMIS.

WILLIAM LEMKE,
Counsel for Petitioners.

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Supplemental Statement of Facts.

In their original brief, petitioners stated the facts in considerable detail. Respondents M. R. Johnson and Joseph M. Loomis have filed their answering brief in which they restate the facts. Petitioners do not propose at this point again to restate the facts in detail, but wish to make the

following comment with respect to certain statements made by respondents

Respondents state (p. 2) that petitioners purchased the real property in question for the sum of $45,500. This statement is not in accord with the facts as the purchase price was in excess of $80,000 (R. 22). Within one year from the issuance of the mortgage petitioners repaid M. R. Johnson approximately $10,000 on his mortgage (R. 113). Respondents say further that part of the mortgage money was used for the purchase of the bonds of the City of Orenco. This is not true. The Orenco bonds were purchased by moneys derived from the sale of collateral stocks pledged to the First National Bank of Forest Grove, Oregon which collaterals were released by respondent M. R. Johnson for the express purpose of buying the Orenco bonds upon the stipulated agreement that the Orenco bonds would then be pledged to the First National Bank of Forest Grove, upon petitioners' note. This bank note was later assigned to Respondent M. R. Johnson and paid in full ($10,000) by the funds derived from the sale of petitioners' crops upon wrongful attachment (R. 25-27).

The sale of 165 acres of land for taxes was for a $70 personal property tax levied against the Oregon Nursery Co., former owner of the land. When brought to the attention of the county court the tax sale was rescinded.

Respondents state (p. 4) that on December 19, 1934 petitioners filed their amended petition asking to be adjudged bankrupts. Particular attention is directed to the fact that this petition was not a petition in general bankruptcy but was a petition for adjudication under Section 75 of the bankruptcy act and stated that petitioners desired to obtain the benefits of that act.

Respondents' statement that a third attempt was made to refer this case to the conciliation commissioner is not

true. The record shows no such petition or order denying it.

In connection with the discussion of petitioners' petition of September 30, 1935 (p. 5-6) attention is directed to the wording of both the petition (R. 16) and the order based thereon (R. 17) indicating beyond question that the nature and purpose of the petition and order was to secure to petitioners the benefits of the amendments to Section 75, approved August 28, 1935 upon the amended petition, and petition for the benefits originally filed under the invalid subsection (s) and then pending in court.

If there is any question about the sufficiency of petitioners' application for the benefits of Section 75 as amended, the petition of February 8, 1935 addressed to the judges of the District Court and the referee praying for appointment of appraisers, appraisal and retention of possession, under the terms of Section 75 (s) leaves no possible doubt on this score (R. 36). This petition was by the clerk of the District Court marked "Filed October 10, 1935 and forwarded to Con. Com." The first hearing held under the amended act was October 21, 1935 (R. 19). In the light of this record, respondents' statement (p. 7-8) that up to July of 1936 petitioners had made no application for relief under the amended act is utterly untrue.

In connection with the chronology of events referred to by respondents, the summary in petitioners' brief (p. 30) surely shows continued and repeated effort on the part of petitioners to obtain compliance with the statute.

With reference to the conciliation commissioner's order of August 8, 1936 (p. 9-10), it should be noted that the so-called determination of the commissioner was a mere recital in the order and at any rate is in obvious contradiction to the record showing ample application for the benefits of the act.

With these comments upon the respondent's statement of facts we proceed to a consideration of the merits of respondents' contentions (Nos. I-IV).

I.

On the Jurisdiction of the Circuit Court of Appeals to Recall and Correct the Mandate.

Respondents concede the general jurisdiction of the court to grant the relief the petitioners ask but contend that the application was not timely. This is the matter dealt with in petitioner's brief under Point II (p. 12-16). It will be noted at once that respondents fail to take cognizance of the controlling factor considered both in the decisions of this Court and the various Circuit Courts of Appeals, namely, whether or not the decision or judgment in question became final during the term in which the same was rendered. Petitioners have heretofore pointed out that the opinion of the Circuit Court of Appeals here in question entered on May 2, 1939, was not a final judgment and could not have become a final judgment until certiorari was denied by this Court on October 23, 1939 (during the succeeding term). When due consideration is accorded this circumstance, respondents' contentions cannot stand, for the very authorities to which they refer clearly indicate that the courts retain jurisdiction over their judgments and orders during the terms in which they become final.

This is the tenor of the authorities referred to in petitioners' original brief and respondents make no effort to meet this fact, but instead try to evade the issue by referring to authorities where the judgments became final in a prior term.

Thus in *Schell* v. *Dodge*, 107 U. S. 629, 27 L. Ed. 601, quoted by respondents (pp. 14-15) the following language appears in the very quotation used by respondents:

> "It has always been held by this Court that it has no power after the term has passed, and a cause has been dismissed or otherwise finally disposed of here to alter its judgment in such a particular as now asked for."

The words "finally disposed of" are the crux of the decision, yet are entirely disregarded by respondents. Respondents state (p. 19) that there were four cases tried together in *Schell* v. *Dodge*, and that in three of them the mandates were not issued until after the close of the term, and state further that the motion to recall was made during the same term that the mandates were issued. That is a misstatement. While there were four cases tried together originally it was only the *Dodge* case in which a motion to recall the mandate was before the court, and in the *Dodge* case the mandate was issued in the prior term.

In *Fairmont Creamery Company* v. *Minnesota*, 275 U. S. 70, 72 L. Ed. 168, which is relied upon by respondents, the judgment of this Court was entered on April 11, 1927. No application for rehearing was made. The October 1926 term ended on June 6, 1927 at which time the Court adjourned. The mandate was issued and filed in the Supreme Court of Minnesota on July 27, 1927. Application for correction was made on September 30, 1927. It seems reasonable to assume from the established procedure of this Court that a mandate would not normally be issued so long as more than three months after the decision was rendered, nor that the mandate would have been issued during summer vacation. The mandate thus appears to have been issued prior to the expiration of the term on June 6, 1927. Petitioners submit that the inference is fairly drawn from this decision that had the application for correction been made prior to June 6, 1927, during the term that the mandate must have issued, the application would have been granted.

Petitioners refer to the case of *Foster Brothers Manufacturing Co.* v. *National Labor Relations Board*, 90 F. (2d) 948 (4th Circuit). This is another case where the facts show that the terms of entry of the judgment and issuance of the mandate had both expired prior to the application for relief and likewise involves a situation where no application for rehearing or other steps to prevent the judgment from becoming final had been taken. We quote from the statement of facts in the opinion:

> "On October 8th, 1936 in the October term of this Court, a decree was entered. No petition to rehear was filed. No request that mandate be stayed. Mandate issued on November 9th, 1936. At that time the October term of Court had adjourned. Since then a special November term of the Court and a January and April terms have been held. After the adjournment of all of these terms and more than six months after the issuance of the mandate to wit on May 11, 1937, a petition is filed to recall mandate and grant rehearing."

From these facts it clearly appears that the *Foster* case was totally dissimilar from the instant case in at least two vital respects. Attention is called to the quotation from the opinion of that case set out in respondents' brief (p. 17) specifically indicating that if jurisdiction is retained over the cause in some appropriate manner the application may be entertained. It should be noted, too, that in the *Foster* case the Court was in the position of a court of original jurisdiction, whereas in the instant case the Circuit Court of Appeals was in the position of a court of appellate jurisdiction. The Circuit Court of the Fourth Circuit pointed out in the opinion that it is well settled, that, after the expiration of the term at which a judgment or decree was entered, a court of original jurisdiction is without power to set it aside.

In *Reynolds* v. *Manhattan Trust Company*, 109 Fed. 97 (8th Circuit) relied upon in respondents' brief (p. 17) the judgment had become final during the preceding term because, as respondents point out, no application for certiorari had been made. Then, too, as is true in the following case of *Hart* v. *Wiltsee*, 25 F. (2d) page 63 (1st Circuit), no application was made to this Court to review the order of the Circuit Court of Appeals denying the application to recall the mandate. It thus follows that the *Reynolds* case is distinguishable from the instant case on the matter of the finality of the judgment, and the *Hart* case is contrary to the decisions of this Court in the *Dodge*, *Fairmont Creamery*, and *Bronson* cases and should be expressly overruled.

The balance of respondents' argument, in this connection, is directed to the authorities referred to in petitioners' brief. Petitioners submit that respondents have wholly failed to show that these authorities are not applicable.

In conclusion petitioners point out that respondents avoid any comment upon the proposition that a mandate is an order of the Court over which it retains control throughout the term, in accordance with the following language of this Court in the case of *Bronson* v. *Schulten*, 104 U. S. 410:

> "It is a general rule of law that all the judgments, decrees, or other orders of the Courts however conclusive in their character are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by that Court."

II and III—(1).

On Petitioners' Motion Not to be Taken as an Application for Leave to File a Bill of Review or Petition for Rehearing in the District Court and on Res Adjudicata.

These contentions of respondents are not before this Court for consideration, for the reason that no such points were

considered by the court below, nor were they suggested either in the petition for certiorari or in any response thereto.

We quote from previous decisions of this Court:

Zellerback Paper Co. v. *Helvering, Commissioner of Internal Revenue,* 55 S. Ct. 127, 293 U. S. 172:

> "One other contention of the government is stated merely to exclude it from the scope of our decision. The government makes the point that the petitioners' return even if filed at the proper time, must be held to be a nullity for the reason that it commingles the income of the affiliated companies, parent, and subsidiary, with that of another company the A. S. Hopkins Co. previously dissolved.
>
> "No such point was considered by the court below, nor was it suggested either in the petition for certiorari or in any response thereto, Review by this court will be limited accordingly."

Charles Warner C. v. *Independent Pier Co. Same* v. *Gulftrade,* 49 S. Ct. 45, 278 U. S. 85:

> "Objections to the decree below were offered by counsel for respondents in their briefs and arguments here. But no application for certiorari was made in their behalf and we confine our consideration to errors assigned by the petitioner."

Federal Trade Com. v. *Pacific Paper Assn.* 47 S. Ct. 255, 273 U. S. 52:

> "Respondents, notwithstanding their failure to petition for certiorari, now ask for reversal of that part of the decree which leaves in force part of paragraph (e) and paragraphs (g) and (h). A party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not

entitled as of right to have that part of the decree reviewed."

See also:

Steele v. *Drummond*, 275 U. S. 199, 48 S. Ct. 53;
Webster Co. v. *Splitdorf Co.*, 264 U. S. 463, 44 S. Ct. 342;
Alice State Bank v. *Houston Pasture Co.*, 247 U. S. 240, 38 S. Ct. 496;
Hubbard v. *Todd*, 171 U. S. 474, 19 S. Ct. 14;
The Maria Martin, 12 Wall. 31-40, 20 L. Ed. 251.

III—(2).

On Validity of the Foreclosure Sale.

Respondents' contend, in this connection, that the order of adjudication entered upon petitioners' amended petition under original subsection (s) constituted an adjudication in general bankruptcy. This contention is utterly absurd. An adjudication proceeds from the petition filed. Petitioners were farmers and could not have been adjudicated bankrupts in general bankruptcy against their will. Certainly petitioners' petition for adjudication, under a particular section of the Bankruptcy Act, together with an application for the benefits of that particular section, can by no means be taken as a petition for an adjudication in general bankruptcy. And, furthermore, subsection (c) of Section 75 provides:

> "If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section."

The very language of the petition quoted by respondents (p. 32) discloses beyond cavil that the sole purpose of the petition was to secure the benefits of Section 75 of the Bankruptcy Act.

Since the section of the law upon which the order of adjudication was based was subsequently held invalid, it seems clear that the order of adjudication was a nullity for all purposes and left the proceedings in the same condition as if no order of adjudication whatsoever had been entered. In the light of these circumstances, any attempted distinction between the instant case and the *Byerly* case is fancied rather than real. And under the authority of the *Byerly* case, as quoted in petitioners' brief (p. 29), the existence of the stay under the act in the instant case seems indisputable where the proceedings remained pending at the time of the attempted sales of real property.

Accordingly, respondents' contentions in connection with the matter of the right of redemption under the Oregon statutes are beside the point for petitioners could not have been reduced to a right of redemption, unless there were valid sales.

Respondents contend (pp. 41-44) that petitioners failed to make application for the benefits of subsection (s) as amended. Petitioners believe respondents' contention in this connection to be purely captious and entirely lacking in substance. The record discloses ample evidence of adequate application by petitioners. After approval of the amended subsection (s) on August 28, 1935, there was forwarded to the conciliation commissioner on October 10, 1935, among other documents, petitioners' petition for the benefits of the original subsection (s). Paragraph 5 of amended subsection (s) specifically provides that:

> "This act shall be held to apply to all existing cases now pending in any Federal Court under this Act as well as to future cases."

Petitioners believe that when this petition was thus presented to the conciliation commissioner prior to the first hearing on October 21, 1935, it constituted a sufficient

request for the benefits of the amended Act, approved August 28, 1935 specially since this presentation was ordered by the District Court. Attention is further directed to petitioners' petition of September 30, 1935 (R. 16), which in and of itself adequately indicates petitioners' intention and request to proceed under the amended Act of August 28, 1935, upon their amended petition, and petition for the benefits both of which were originally filed under the invalid subsection (s) and then pending in court.

The conciliation commissioner accepted this amended petition as proper under the new subsection (s) approved August 28, 1935 for he seized the personal property listed in its schedules, but he refused to accept the petition for the benefits, holding that it was not a proper request under the new act. Petitioners submit that either both petitions were valid or both petitions were void. And, furthermore, the very amended petition upon which the conciliation commissioner exercised jurisdiction contains within itself a request for the benefits.

Further arguments on this subject would seem to be foreclosed by the opinion of this Court in the case of *Wright* v. *Vinton Branch*, 300 U. S. 440, quoted from by petitioners in their original brief (p. 25) wherein it is specifically held that after the entry of the order of reference no further affirmative action by petitioner precedent to his obtaining the stay was necessary. Petitioners' order of reference was entered on October 15, 1935.

III—(3).

On the Appointment of a Trustee and the Sale of Personal Property.

We have heretofore seen that respondents' contentions with respect to the validity of the sale of real property and

with respect to the insufficiency of petitioners' application for the benefits of the Act, are entirely unfounded.

It therefore follows that respondents' argument in connection with the propriety of the acts of the referee is based wholly upon false premises, and has no application. Petitioners pointed out in their original brief that this Court, in the *Wright* and *Bartels* cases, specifically held that the duty of the referee to proceed to give the farmers-debtors the benefits of the Act was *mandatory*. It is this very failure of the referee to perform his duty and comply with the mandate of the statute of which petitioners here complain.

Petitioners further complained that should this Court hold the order of the District Judge confirming the appointment of a trustee and entered on December 14, 1936 to be voidable; that it is error for the Circuit Court of Appeals to hold this order *res adjudicata*. Petitioners pointed out in their brief (p. 26) that their petition of January 4, 1937 retained jurisdiction of the question, under the authority of the "Wayne" case.

Respondents in their brief (p. 30) contend that the instant case did not come within the exception laid down in the "Wayne" case because the petition of January 4, 1937, was not "entertained". The language of this Court in the "Wayne" case reads as follows:

> "Bankruptcy court in exercise of sound discretion if no intervening rights will be prejudiced by its action, may grant rehearing on application, diligently made, and rehear case on merits, and even though it reaffirms its former action and refuses to enter decree different from original one, order entered on rehearing is appealable and time for appeal runs from its entry."

In the instant case an application for rehearing was diligently made, case was reheard on merits on January 11, 1937, and the referee refused to enter decree different from

original one. Petitioners submit that their petition of January 4, 1937 was reheard on merits and comes within the rule.

IV.

(1) The Bartels Case.

In their discussions of the *Bartels* case, respondents practically concede the effect of that decision as demonstrating the error in the opinion of the Circuit Court of Appeals, wherein that court held that petitioners had not made a good faith proposal and were financially unable to rehabilitate themselves. Respondents expressly rely upon *res adjudicata* in support of the decision of the Circuit Court of Appeals which was not relied upon by the court itself and which contention is not before this Court upon certiorari.

The matter of good faith and ability to rehabilitate are fully disposed of in the *Bartels* case and must be eliminated as any basis for upholding the decision of the Circuit Court of Appeals.

(2) The Kalb Case.

Respondents seek to limit the language of the *Kalb* decision to a proceeding for composition and extension subsections (a) to (r). The language of the opinion is not capable of such a narrow application for it expressly provides

> "In harmony with the general plan of giving the farmer an opportunity of rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts."

The opinion did not say that the farmer was relieved only until he amended the petition under subsection (s).

The farmer is relieved and the State courts are stayed under the *Kalb* decision from the filing of the farmer's original petition and as long as his petition remains pending in either its original or amended form. The *Kalb* case is applicable to the instant case because petitioners filed their original petition on August 10, 1934 and it remained pending in its original form until September 30, 1935, and has been pending since then in its amended form.

(3) The Byerly Case.

As hereinbefore pointed out, petitioners believe that respondents' attempts to distinguish the *Byerly* case from the instant case are wholly ineffectual. Certainly Byerly's amended petition invoking original subsection (s) had the same effect as the amended petition and order of adjudication in the instant case. And if there was a stay in effect in the *Byerly* case after the invalidation of former subsection (s), then it must follow that there was a stay in effect in the instant case after the invalidation of former subsection (s).

(4) The Borchard Case.

Respondents accord the *Borchard* case but scant consideration. However, petitioners believe that the language of the opinion referred to in the original brief (pp. 21-22) has a specific application to the instant case particularly as showing that the petitioners are entitled to a compliance with the procedure required by the statute.

Conclusion.

In conclusion, petitioners respectfully submit that the respondents have failed to meet or refute the arguments advanced in petitioners' original brief and that as therein

pointed out their application for relief to the Circuit Court of Appeals was timely, was meritorious, and was within the power of the court to grant and that under all of these circumstances and under the controlling decisions, it was a clear abuse of discretion on the part of the Circuit Court of Appeals to deny the application.

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